No. 13122

United States Court of Appeals
For the Ninth Circuit

THE UNITED STATES OF AMERICA and R. P. JANDL, as Administrator of the Estate of William F. Leland, Deceased, and C. W. BREAKIRON, Successor Receiver for Atlantic and Pacific Airlines, *Appellants*,

vs.

EAGLE STAR INSURANCE COMPANY, LIMITED; ORION INSURANCE COMPANY, LIMITED; THE DRAKE INSURANCE COMPANY, LIMITED, subscribing underwriting members of Lloyd's, London, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

J. CHARLES DENNIS
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Appellants respectfully petition the court for a rehearing upon the following grounds:

1. The court decided an important question of local law in a way that probably is in conflict with applicable local decisions.

(This court's attention was not called to the fact that the Washington court, *en banc*, had reversed a departmental holding on the particular question.)

2. The court did not pass upon appellants' contention that appellees failed to sustain the burden of proving their affirmative defense that the insured was

guilty of negligence which was the proximate cause of the loss insured against.

3. The court did not pass upon appellants' contention that the trial court erred in excluding evidence and rejecting plaintiffs' offer of proof relating to weather and air traffic conditions.

ARGUMENT

This is the very exceptional case wherein a lawyer's inclination to advise as to the futility of a petition for rehearing is overcome by his conviction that a fundamentally wrong decision has been rendered.

It is not merely the interests of the litigants that makes it important for a correction of the decision to be made. If allowed to stand it will have a disastrous effect upon the construction of insurance policies.

Ground 1: The Court Decided an Important Question of Local Law in a Way that Probably Is in Conflict with Applicable Local Decisions.

Scope and Basis of Decision

The court had before it a condition of a kind commonly found in insurance policies. It provided for mitigation of damages in event of a loss covered by the policy. The court construed this condition out of context as a general warranty against negligence. This violated basic principles of insurance law hereinafter discussed, — principles that have been applied consistently by the courts of all jurisdictions, including Washington State.

It will be recalled that this was a suit on a policy of

aircraft insurance for loss of plaintiffs' airplane in an attempted take-off at Boeing Field, Seattle. The insuring clause of the policy reads:

> "SECTION 1—LOSS OR DAMAGE TO AIRCRAFT
>
> "A. The Underwriters will pay for or make good accidental loss of or damage to the Aircraft whilst in flight or on the ground or on the water, including any equipment or accessories while attached to and forming a part of the Aircraft, from whatever cause arising except frost, wear and tear, gradual deterioration, mechanical breakage or breakdown, but including accidental damage caused thereby. This Section shall include loss or damage by burglary, theft or malicious means unless it be proved by the Underwriters that such loss or damage was caused by a servant or agents or person under the control of the Assured."

It is not suggested by this court nor even contended by appellees that the insuring clause does not cover the loss sustained. Such a contention would be completely untenable in view of the broad language employed.

The only provision in the entire policy relied upon to exclude coverage for loss allegedly caused by the negligence of the assured is Condition 3, which reads:

> "3. The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured and in the event of the Aircraft sustaining damage covered by this Certificate and/or Policy, the Assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of

the damaged Aircraft and its equipment and accessories." '

Appellees (the insurers) refused to pay for the loss of the aircraft and appellants sued on the policy.

The defense which formed the basis of the decision denying recovery to the assured was the affirmative one (a) that Condition 3 quoted above excluded from the coverage of the policy any loss of the airplane caused by negligence of the assured and (b) that negligence of the assured caused the loss.

Appellants contended that Condition 3 was not intended to exclude insurance coverage as to any loss or damage caused by the negligence of the assured, but was designed to prescribe the duties of the assured with regard to mitigating loss or damage and securing the safety of the aircraft in event of an accident (10)*; that a fair reading of the condition would compel the adoption of this construction of it; that this construction accomplishes a reasonable result in that it would serve a useful purpose without forfeiting the rights of the assured to the protection which he would normally expect from such a policy (21); that the policy must be construed as a whole and in the light of its intent and purpose as gathered from the entire instrument (14); that conditions, exceptions and exclusions from coverage will be construed strictly against the insurer (17, 18); and where language of a policy is doubtful it should be construed against the insurers who wrote it (14).

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*Unless otherwise indicated, all numerical references herein are to the pages of the "Brief of Appellants."

This court referred to the above arguments without comment other than to say that appellants called attention to numerous decisions supporting the two last mentioned propositions (Opinion 3, 4).

Appellants also argued, and cited many authorities from the State of Washington and elsewhere supporting the following propositions: that loss of the assured's property caused by his own negligence is covered in such a policy unless excluded by clear and explicit language (19); that an interpretation excluding such coverage would defeat the primary purpose of the policy (10); that a clumsy arrangement of words will not be allowed to contravene a reasonable construction according to the intention (15); that if one construction of an insurance policy would contradict its general purpose this is strong evidence that such a construction was not intended by the parties (15); that if a policy will fairly admit of two constructions the one should be adopted that will indemnify the assured even though the insurer may have intended another meaning (16, 17); and that giving the condition the meaning contended for by appellants accords with the rule, frequently applied in construing insurance policies, that words of general import should be held to include only things similar in character to those specifically named (23). The decision makes no reference to any of these arguments.

Appellants referred to the fact that the policy expressly insured against accidental damage caused by frost, which the trial court found was the cause of the accident (12). They also pointed out that the language relied on to exclude insurance is in a part of the

policy where it would not suggest that meaning to the assured (24) and that a slight transposition of the single word "and" resolves all ambiguity in favor of the assured. Authority, including the Washington Supreme Court, was cited holding that in interpreting a contract words may be transposed to make the meaning clear and carry out the intent of the parties (25). The opinion contains no mention of any of these points.

This court did not question any of the above propositions and apparently considered them correct as matters of general law. The basis of the decision seems to have been a conclusion on the part of the court that the law relating to construction of insurance contracts is different in Washington from the general law on the subject as developed in other jurisdictions. The only authorities cited for this conclusion are *Isaacson Iron Works v. Ocean Acc. etc. Corp.*, 191 Wash. 221, 70 P. 2d 1026, and *Hamilton Trucking Service v. Automobile Ins. Co.*, 139 Wash. Dec. 636, 237 P.2d 781.

The *Isaacson Iron Works* case was the one mainly relied on. The court states that the policy in that case "contained a provision strikingly like that in the matter now before us" (Decision p. 5) and reaches the conclusion that "We must, we think, follow the *Isaacson Iron Works* case, *supra*" (p. 7).

The court concluded its consideration of the *Isaacson Iron Works* case with a statement so sweeping in scope that it is likely to be often quoted by insurers desiring to escape liability on policies written in the State of Washington:

"That decision appears to be in line with what

we might call a 'literal' rule of construction of insurance policies which appears to be the established rule of the State of Washington." (p. 5)

In the remainder of this part of our argument we expect to show that:

1. The Washington Supreme Court, in an *en banc* rehearing, reversed a departmental decision on this very point and expressly repudiated any rule of literal construction of insurance contracts.

2. The *Isaacson Iron Works* case is not controlling and does not support the view that there is a rule of literal construction of insurance contracts in the State of Washington.

3. Cases cited in the *Isaacson Iron Works* case show that there is no such rule.

4. Washington cases decided after the *Isaacson Iron Works* case reject any rule of literal construction.

5. The *Hamilton Trucking Service* case has no controlling effect in this case. It does not indicate in any way that there is a "'literal' rule of construction of insurance policies" in the State of Washington.

1. The Washington supreme court, in an *en banc* rehearing, reversed a departmental decision on this very point and expressly repudiated any rule of literal construction of insurance contracts.

This occurred in

Port Blakely Mill Co. v. Springfield, etc. Ins. Co., 59 Wash. 501, 110 Pac. 36.

This case involved a suit on a fire insurance policy. The case is noteworthy for several features: (1) The

provision construed by the court was expressly called a "warranty," not a condition, in the policy. (2) The words of the provision if literally construed would clearly have prevented recovery. The words were:

> "Warranted by the assured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order." (59 Wash. at p. 503, 110 Pac. at p. 37)

The facts were that the sprinkler system had not "at all times" been maintained in good working order. It was not in operation for a period prior to the fire, but was operating when the fire occurred. (3) The Washington court in a four to one departmental opinion had granted judgment for defendant, upon the ground that the literal wording of the policy precluded recovery (56 Wash. 681, 106 Pac. 194).

The Washington court granted a petition for rehearing, and, sitting *en bance*, reversed the departmental decision. With only one justice dissenting, it held that the plaintiff was entitled to recover. The court used the following language which is worthy of special note:

> "It is unquestionably true, however, that there are cases, though not by any means a majority of the hundreds of cases that have been decided upon this question, that hold to the strict rule contended for; but in grateful contrast to those courts which adopt the rule of strict construction by, it seems to us, making a fetich of words, expressions, and definitions, and attributing potent magic to the word 'warranty,' or words of similar import, comes like a refreshing breeze from the sea of judicial enlightment, the voice of the supreme court of Kentucky, in *Germania*

Ins. Co. v. Rudwig, 80 Ky. 223, where the rule is condemned." (p. 519 of 59 Wash., p. 43 of 110 Pac.)

The *Port Blakely Mill Co.* case is noteworthy for a further reason. There the court pointed out that the principle "expressio unius est exclusio alterius" applied because certain conditions of the policy provided specifically that their breach would void the policy, whereas the provision construed by the court did not so provide. This is true in the instant case. Condition 9 provided specifically that its breach would void the policy. Condition 3 did not so provide nor was its subject matter included in the "General Exclusions" which specifically listed 6 kinds of loss and damage that the policy "does not cover" (R. 44). This language of the Washington court in the *Port Blakely Mill Co.* case therefore applies:

> "In the *Hart* case, *supra*, certain similar conditions were reviewed, and the court held that, under the rule of expressio unius est exclusio alterius, the particular clause could not be construed to be a warranty. That rule applies with especial clearness to this case, where so many provisions provide especially that the contract shall be void if they are not complied with, and where there is no such provision in the representation relied upon." (59 Wash. 501 at pp. 512-513, 110 Pac. at p. 40)

The *Port Blakely Mill Co.* case was cited with approval by the Washington court three years after its *Isaacson Iron Works* decision, in

> *Kane v. The Order of United Commercial Travelers of America*, 3 Wn.2d 355, 361, 100 P.2d 1036.

2. *Isaacson Iron Works v. Ocean Acc. etc. Ins. Co.*, 191 Wash. 221, 70 P.2d 1026, is not controlling and does not support the view that there is a rule of literal construction of insurance contracts in the state of Washington.

Although this court relied upon such a supposed rule in construing Condition 3, we think it recognized, in construing Conditions 1 and 2 of the policy that the rule is otherwise. The court refused to give those conditions the meaning contended for by appellees and construed them strictly against the insurer. It rejected appellee's contention that the certificate of airworthiness required by Condition 2 was invalidated by asserted overloading. It employed language in reaching this result which, with substitution only of the words italicized below, applies squarely as to Condition 3:

> "Had it been intended to make this *third* condition one which prohibited *negligence* or other violations of applicable regulations, it would have been a simple matter to find appropriate words to say so." (pp. 7-8)

This court also rejected appellees' contention that the insured must have known that Condition 2 was intended to refer to "operation limitations" as defined in Regulation 13 of the Civil Aeronautics Board. The court said:

> "We think that the answer to this suggestion must be that the condition did not so state, and we are not permitted to read into the insurance certificate something which the parties may be supposed to have intended but which they have not stated." (p. 8)

In connection with the construction of Condition 3

it is contended in effect that the insured must have known that this condition, although it dealt primarily with an entirely different subject and was not in the "General Exclusions", was intended to exclude all insurance against loss caused by negligence of the insured in operating the airplane.

The language last above qucted is as applicable to the construction of Condition 3 as it is to the construction of Condition 2.

We think this shows an inherent inconsistency in the decision which can not help leading to confusion unless corrected.

We probably should have said more about the *Isaacson Iron Works* case in our reply brief. It seemed to us that the case was so clearly distinguishable from this one that it was sufficient, in the limited space available, to point out a basic distinction that was common to that and ten other cases cited by appellees (Reply Br. 9). We referred to the case again while discussing the fact that appellants sustained the burden of proving that the loss sustained was within the terms of the policy (Reply Br. 12).

It was not suggested by appellees that there is a literal rule of construction of insurance contracts in the State of Washington, so that possibility was not discussed either in the briefs or the oral argument. We submit that this court should not announce the existence of a rule which would be such a radical departure from the established principles of insurance law until the views of both parties have been presented with that particular point in mind.

There are several fundamental distinctions between the provision discussed in the *Isaacson Iron Works* case and the language relied on to exclude coverage in this case.

1. The most basic distinction between the *Isaacson Iron Works* case and this one is that that case dealt with a provision that was not capable of being construed, while this deals with one that is. The question there was not whether the provision should be construed "literally" as distinguished from liberally, but whether it should be entirely eliminated. The provision was so plain, simple and unambiguous that there was nothing to construe. The Washington court said that it "must either be given effect according to its plain language, or by judicial interpretation written out entirely" (p. 228 of 191 Wash. p. 1030 of 70 P. 2d). In contrast, Condition 3 in the present case is, to say the least, capable of being given the meaning that appellants say it was intended to have. The *Isaacson Iron Works* case does not purport to say that a policy must be given a construction favorable to the insurer if it is capable of such meaning. The rule, in Washington as everywhere else, is that any language limiting the liability of the insurer must be given as narrow and restricted a meaning as it is capable of.

2. The provision in the *Isaacson Iron Works* case was a simple sentence devoted to the subject of negligence: "The assured agrees to use due diligence and exercise reasonable care to avoid doing damage to the property of others." Notice the standard phraseology of negligence that is employed.

In the instant case no language as to the "exercise

of reasonable care" is employed at all. The phrase "due diligence" is used, but it is related to the performance of affirmative acts by the assured similar to those commonly required in a clause relating to mitigation of damages. Such acts would not be specified in a clause intended as a warranty covering "exercise of due care" in the avoidance of damage generally. The language of Condition 3 would be comparable to that in the *Isaacson Iron Works* case only if it expressly required the assured to exercise due care in all operations of the airplane. That language is not in Condition 3 and should not be read into it unless we are prepared to emasculate the policy and lay a new basis for the defeat of the assured under any insurance policy containing a clause for the mitigation of damage.

3. So far as the record shows, the language relied on to exclude coverage in the *Isaacson Iron Works* case was in the part of the policy where one would expect to find such exclusions and not buried among a number of general conditions dealing with other matters as was done here (24).

4. We have noted that appellees' entire case depends upon the placement of a single word "and" in Condition 3; that a judicially approved transposition of this single word resolves any ambiguity that might exist in Condition 3 *in favor of the assured* (24-26). This is not applicable to the language in the *Isaacson Iron Works* case.

The only similarity between the *Isaacson Iron Works* case and this one appears to be a superficial similarity between the words of the provision referred to in that case and some of the words of Condition 3

if the latter are read out of their context without any reference to the policy as a whole or even to the rest of the sentence of which they are a part.

It seems clear that the *Isaacson Iron Works* case does not announce any "rule of literal construction" of insurance policies. Instead, the case is authority for the view that the same principles are applicable thereto as control the construction of contracts generally. The court said:

> "This court has laid down the rule that, in construing policies of insurance the general rules for construction of contracts apply." (191 Wash. at p. 227, 70 P.2d at p. 1029)

3. Cases cited in the *Isaacson Iron Works* case show that there is no such rule.

Three cases cited in the *Isaacson Iron Works* case show clearly that there is no such thing as a literal rule of construction of insurance contracts in the State of Washington; that the rules for construing such contracts are the same in Washington as everywhere else. These cases are:

Maylon v. Ocean Accident & Guarantee Corp., 149 Wash. 70, 270 Pac. 96;

Ragley v. Northwestern Nat. Ins. Co., 151 Wash. 545, 276 Pac. 537;

Brown v. Northwestern Mutual Fire Assn., 176 Wash. 693, 30 P.2d 640.

In *Ragley v. Northwestern Nat. Ins. Co., supra,* 151 Wash. 545, 276 Pac. 537, the court expressly held that a provision in an insurance policy should not be read

literally. The case is particularly significant because the court quoted other provisions which expressly stated that their violation would void the policy and then said:

> "We quote these specific conditions as bearing upon the question of whether or not the general words, above quoted, specifying the insurance 'while occupied only for dwelling house purposes,' shall be read literally and unqualifiedly."

After holding that they should not be so read, the court said:

> "This conclusion finds support in the rule adopted by this court, in harmony with the rule generally adhered to by the courts, that uncertainty of application in the meaning of the language of an insurance policy, especially language therein intended to provide for forfeiture of the rights of the insured, is to be construed favorably to the insured." (p. 548 of 151 Wash., p. 538 of 276 Pac.)

In *Maylon v. Ocean Accident & Guarantee Corp.*, *supra*, 149 Wash. 70, 270 Pac. 96, the court refused to give a literal or strict construction to a provision in a policy insuring the contents of a safe. The policy provided that the insurer should not be liable for loss of money from within any safe containing a chest or compartment of any description unless both the safe and the chest or compartment were entered by actual force and violence leaving marks thereon. A steel chest was kept in the safe but the insured never locked it and habitually kept their money in drawers, pigeon holes or compartments which were opened by opening the main doors of the safe. The money lost was taken

from such compartments and not from the inner chest. The court referred to another provision of the policy which described the safe as burglar-proof as distinguished from fire-proof or fire-proof with burglar-proof chest and said that this rendered the presence or absence of an inner chest wholly immaterial. The court said:

> "What was insured was the contents of a burglar-proof safe, having walls and doors as specified, and the earlier words of the policy, 'within any safe containing a chest,' do not apply; those words being intended only to apply to class 3, *i.e.*, 'fire-proof safe with burglar-proof chest'." (p. 74 of 149 Wash., p. 98 of 270 Pac.)

The court also said that

> "if a policy be uncertain or ambiguous it must be construed strictly against the insurer under all authority * * *. There being no clear and unambiguous provisions in the policy here considered limiting liability only to the contents of an inner chest, or requiring the insured to keep the property in such inner chest, the judgment appealed from is right and it is therefore affirmed." (pp. 74, 75 of 149 Wash., p. 98 of 270 Pac.)

In *Brown v. Northwestern Mutual Fire Assn., supra,* 176 Wash. 696, 30 P.2d 640, the court again applied the same principles, saying:

> "* * * it is the universal rule that insurance policies are strictly construed against the insurer and liberally construed in favor of the insured." (p. 700 of 176 Wash., p. 642 of 30 P.2d)

4. Washington cases decided after the *Isaacson Iron Works* case reject any rule of literal construction.

The Supreme Court of Washington has rendered a number of decisions in which any "literal rule of construction of insurance policies" is rejected in the strongest possible terms. This court, in discussing Condition 3, did not refer to any of these decisions. We have discussed the *Port Blakely Mill Co.* case, in which a departmental decision was reversed on this point. We have also seen that the very cases cited in the *Isaacson Iron Works* case show that there is no such rule. Other cases, decided after the *Isaacson Iron Works* case, deal explicitly with this point and set forth the reasons for the Washington court's view. One such case, to which we have already referred, is

> *Kane v. The Order of United Commercial Travelers of America*, 3 Wn.2d 355, 100 P.2d 1036.

Here suit was brought upon a health and accident insurance certificate for death resulting from pneumonia. The certificate provided that the insurer should not be liable for any "infection". The insurer contended that medical authorities generally classify pneumonia as a species of infection. The Supreme Court held that the word "infection" is susceptible of another meaning on the part of laymen so as not to include pneumonia, and used this strong language, buttressed by many citations:

> "(1) It is the established rule in this and many other states that, where a provision of a policy of insurance is capable of two meanings, or is fairly susceptible of two constructions, that mean-

> ing and construction most favorable to the insured must be applied even though the insurer may have intended another meaning; because the insurer, and not the insured, is the author of the instrument. (citations)" (3 Wn.2d 355 at p. 359-360, 100 P.2d at p. 1038)

The following cases, all subsequent to the *Isaacson Iron Works* decision, support the same view:

> *Jack v. Standard Marine Insurance Co.* (1949) 33 Wn.2d 265, 205 P.2d 351;
>
> *Handley v. Oakley* (1941) 10 Wn.2d 396, 116 P.2d 833;
>
> *Doke v. United Pacific Insurance Co.* (1942) 15 Wn.2d 536, 131 P.2d 436.

The case of *Jack v. Standard Marine Insurance Co.*, 33 Wn.2d 265, *supra*, is illustrative. Here the policy covered a diesel shovel against "upset or overturning." The shovel in question, while ascending an incline, was damaged when its boom fell over backwards and came to rest on top of the cab of the machine. This caused the machine to tip backwards with its front end raised about three feet off the ground. Now, under any rule of literal construction, there clearly was no "upset or overturning" to bring the situation within the coverage of the policy. In spite of strong argument from the insurer to that effect, the court construed this language with reference to the policy as a whole and affirmed a judgment for plaintiff. The court cited the earlier case of *Guaranty Trust Co. v. Continental Life Ins. Co.*, 159 Wash. 683, 294 Pac. 585, reproducing the following quotation therefrom:

"There is another principle applying to contracts of insurance to the effect that, if they are so drawn as to require interpretation and fairly susceptible of two different conclusions, the one will be adopted most favorable to the insured; and will be liberally construed in favor of the object to be accomplished, and *conditions and provisions therein will be strictly construed against the insurer, as they are issued upon printed forms prepared by experts at the instance of the insurer, in the preparation of which the insured has no voice.*" (33 Wn.2d at p. 271, 205 P.2d at p. 354)

5. *Hamilton Trucking Service v. Automobile Ins. Co.*, 139 Wash. Dec. 636, 237 P.2d 781, has no controlling effect in this case. It does not indicate in any way that there is a "'literal' rule of construction of insurance policies" in the state of Washington.

The only case other than the *Isaacson Iron Works* case that is cited by the court as illustrative of a supposed "rule of literal construction" is *Hamilton Trucking Service v. Automobile Ins. Co.*, 139 Wash. Dec. 636, 237 P.2d 781. This court, in summarizing that decision, does not refer to the most significant provision in the insurance policy actually before the court that governed the holding which it announced.

The policy in that case insured against "(c) Accidental collision of the motor truck or trailer with any other automobile, vehicle or object" (237 P.2d, p. 782). This court summarizes the holding of the Washington court as though this were the only provision in the policy that was applicable. However, it was another provision in the policy before the Washington court which governed the collision of the "contents" or load on the

truck with any other object. This provision expressly confined coverage to

> "(a) * * * collision of the contents on the Assured's vehicle with any other vehicle or object *due to overwidth or overheight of load as may be defined by law, it being warranted the Assured will operate under special statutory requirements of the State Laws.*" (Italics ours; *ibid*, p. 783)

The Washington court denied recovery in a collision between the load on a truck and an underpass *upon the express ground that the collision was not "due to overwidth or overheight of load as may be defined by law" so as to come within the foregoing provision of the policy.* The court stated:

> "By its plain terms, the risks assumed are accidental collision between the truck upon which the property is being carried and some other object, and a collision between the property covered and some other object due to the width or height of the load being in excess of that limited by law. Rem. Rev. Stat., Vol. 7A, Sec. 6360-48 (P.P.C., Sec. 292-3) fixes the maximum height of a load at twelve feet and six inches above the level surface upon which the vehicle stands. The load on the respondent's truck was twelve feet and three inches in height. Endorsement No. 1, being limited to overheight loads, did not cover the load on respondent's truck." (*ibid*, p. 783)

A further feature distinguishing the *Hamilton Trucking Service* case from the instant one is that the language limiting coverage to oversize loads only was set forth *in the insuring clause of the policy.* What the insured urged the Washington court to do was to consider the supposed purpose of the policy to the ex-

tent of disregarding the plain limitation of coverage to oversize loads. No ambiguity was presented.

The policy in that case presented no question as to the construction of a condition relied on to take away the coverage given by the insuring clause as is the case here.

This court, in commenting upon the *Hamilton Trucking* case stressed the quotation in which the Washington court refers to cases that it refused to follow from seven states in which recovery was permitted under similarly worded policies although the collision was of the load with another object (Decision, 6). Such language must have influenced this court in inferring that the Washington court has adopted a "rule of literal construction." Such a conclusion can not be drawn from the statement referred to. Even if it is assumed that seven other jurisdictions emphasized the purpose underlying policies containing language similar to that above noted to the point of disregarding limitations in the insuring clause, it would be a plain non-sequitur to conclude that the Washington court adopted any "rule of literal construction."

What the court in the *Hamilton Trucking* case said, in effect, was that it would not find ambiguity where none existed in order to construe the policy in favor of the assured. Such an observation was proper as to the language before the court; we would not urge any other view. However, this is a far cry from construing a mitigation of damage clause so broadly as to defeat recovery for loss resulting from negligence of the insured in operating the airplane.

Ground 2: The Court Did Not Pass Upon Appellants' Contention that Appellees Failed to Sustain the Burden of Proving Their Affirmative Defense that the Insured Was Guilty of Negligence Which Was the Proximate Cause of the Loss Insured Against.

This court's treatment of Condition 3 is inconsistent with views it expressed as to Conditions 1 and 2. The court stated as to the latter:

> "Conditions such as those we are here considering are in the nature of conditions subsequent, and the burden is upon the insurer to prove that they have been breached. (citations) We think such burden has not been sustained here." (Decision, pp. 8-9)

Since that statement of the law applies also to Condition 3, how could it be doubted that it was incumbent upon the insured to prove not only that there was negligence of the insured but also that such negligence caused the loss? The insurers themselves recognized this point, by pleading this defense affirmatively and then assuming the burden of proving it at the trial.

The Washington court in its *en banc* decision in the *Port Blakely Mill Co.* case rejected the view previously adopted in its departmental opinion, that breach of the obligation to maintain the sprinkler system "at all times" precluded recovery even though the fire was not shown to have been caused by such breach, stating:

> "This rule seems to be opposed to our primary conception of fair dealing, is not practiced or tolerated in our everyday affairs with each other, is

> not a commendable rule of action under any circumstances, and is diametrically opposed to the general rule that only such damages can be recovered from the breach of a contract as are shown to be the result of such breach. This rule has stood the test of time, because it is based upon common sense and fair dealing, and no court has ever felt called upon to apologize for it or distinguish it out of existence." (59 Wash. at 505, 110 Pac. at 38)

This court has not commented at all on the important question whether the evidence sustained the finding of the trial court to the effect that the crash of the insured's aircraft was caused by icing (Finding IX, decision p. 3). In our briefs we stressed that the testimony of defendants' witnesses themselves shows without question that they renounced this theory; that there is absolutely no valid basis in the record for such a finding (30-46, Reply Brief pp. 13-18). We have shown that the same is true as to asserted overloading and weather conditions (46-56, Reply Brief 13 *et seq.*). Both sides briefed this question.

There are two different points which we probably should have stressed more in our briefs in connection with this subject matter:

(1) Appellees at the trial assumed the burden of proving their affirmative defense, and of establishing the cause of the crash through their expert witnesses. This court has held squarely that where appellees, with appellants' approval, assumed such a burden they will be held to that position on appeal:

Kentucky-Virmilion Mining & Concentrating Co. v. Norwich Union Fire Ins. Society (C.C.A. 9) 146 Fed. 695.

This court stated therein:

> "The general rule is that a party who, with the acquiescence of his adversary, assumes the burden of proof of an issue will be held to that position on appeal." (*Ibid*, 702)

Consequently, there can be no serious question but that if the record fails to sustain appellees in their contention that breach of Condition 3 caused the crash, appellants are entitled to reversal wholly irrespective of the disposition by this court of Question 1. Can it be denied that this court should have discussed Question 2 in its decision?

(2) To reach the result contended for by appellees and defeat recovery on the policy for breach of Condition 3, it is necessary to accept the broad, sweeping proposition which appellees advance, that "A breach of a Condition Material to the Risk Voids a Policy of Insurance" (Br. of Appellees, pp. 33-37). What appellees really contend is that the same consequence would follow from breach of Condition 3 as would result from a breach of warranty.

The decision of this court would probably be construed as an implicit approval of that proposition. If so, the decision would constitute a most regrettable innovation in insurance law. There is not a single case cited by appellees to sustain that position. Seventeen cases are listed by them under the proposition above noted, which on first glance might appear to

lend support to it. A reading of these cases should leave no doubt whatsoever that they do not support such a proposition in the slightest. Most of them turn upon an express provision that "the policy is void" if the insured property is not located at or is removed from a stated location, or if the insured plant is idle more than a specified time, or if foreclosure proceedings are started, or if some other, reasonable, contingency occurs.

All of the remaining cases listed by appellees, without exception, pertain to a *warranty* clearly labeled as such, and do not pertain at all to the consequences of breach of condition.

(3) Other authorities cited by appellees elsewhere in their brief to sustain their argument that breach of Condition 3 should defeat recovery serve only to illustrate further the complete inapplicability of any authority available to them. Thus, appellees cite as a leading authority *Richelieu & O. Nav. Co. v. Boston, etc. Ins. Co.*, 136 U.S. 408, 10 S. Ct. 934 (Br. of Appellees, p. 23). This case very clearly turns upon special provisions in an insurance policy relating to seaworthiness and errors of navigation. More importantly, this and other similar cases cited by appellees (Br. 23-25) relate to collisions of vessels on the high seas, and it is clear that *what is involved is a principle peculiar to maritime law.* That principle, unlike the usual law of proximate cause, makes a vessel liable for a marine collision or accident, or jointly responsible therefor, if it violated an applicable maritime regulation even though such was not the proxi-

mate cause of the collision or accident. The following cases recognize that the *Richelieu* case and kindred decisions are applicable only in maritime law for the reason indicated:

N. Y. & Cuba Co. v. Cont. Ins. Co., 117 F.2d 404;

The Aakre (C.C.A. 2) 122 F.2d 469;

Peoples Coal Co. v. Second Pool Coal Co. (Dist. Ct., Pa.) 181 Fed. 609.

Ground 3: The Court Did Not Pass Upon Appellants' Contention that the Trial Court Erred in Excluding Evidence and Rejecting Plaintiffs' Offer of Proof Relating to Weather and Air Traffic Conditions.

This question was discussed by both sides in their briefs (Appellants' Br. 56, Appellees' Br. 63). It presents a separate and independent issue. It involves the propriety of rulings made by the trial court excluding certain evidence regarded by the court itself as material, and rejecting an offer of proof made by plaintiffs relating thereto (56-60). This offer of proof was to the effect that immediately prior to the accident other scheduled and non-scheduled airliners had been taking off from the same runway as the insured aircraft; that their pilots had found runway and weather conditions safe for take-off; that the pilot of the insured aircraft just a moment before take-off reported that he could see the runway lights visible at the opposite end of the runway over 5000 feet away, and that he was cleared for take-off by the control tower (58-60).

Surely this is a case where a rehearing should be had to keep consistency in the law and do justice between the parties.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

JACK R. CLUCK, one of the counsel for the above named appellants and petitioners, certifies that in his judgment the petition for rehearing which accompanies this certificate is well-founded and that it is not interposed for delay.

EXECUTED this 22nd day of May, 1952.

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JACK R. CLUCK